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Supreme Court of the United States

OCTOBER TERM, 1962

ASSOCIATION OF MAXIMUM SERVICE TELECASTERS, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, NEW ORLEANS TELEVISION CORPORATION, CAPITOL BROADCASTING COMPANY AND AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia Circuit dismissing petitioner's notice of intention to intervene in an appeal from an order of the Federal Communications Commission entered in a proceeding in which petitioner took an active part.

OPINIONS BELOW

The Court of Appeals wrote no opinion. The memorandum opinion and order of the Federal Communications Commission (FCC R. 298-306)[1] is reported at 23 Pike & Fischer Radio Reg. 1113 and is printed at pages 1a-14a, *infra*.

JURISDICTION

The judgment of the Court of Appeals dismissing petitioner's notice of intention to intervene (R. 66; p. 15a, *infra*) was entered on November 16, 1962. Its orders denying a timely-filed petition for reconsideration and reconsideration *en banc* (R. 93-94; pp. 16a-17a, *infra*) were entered on January 10, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(i).

QUESTION PRESENTED

Whether under Section 402(e) of the Communications Act a person has the right to intervene and participate in proceedings upon an appeal from an order of the Federal Communications Commission when such person (1) in recognition of its interest was allowed by the Commission, over objection, actively to participate in the proceeding that eventuated in the Commission's order, and the points made by it, including those made by it alone, were discussed and dealt with by the Commission, (2) was notified by the Commission, pursuant to Section 402(d) of the Communications Act, requiring that notice be given to each person shown by the Commission's records to be inter-

[1] References "(FCC R. ....)" are to the record made before the Federal Communications Commission filed in this Court. References "(R. ....)" are to the record of proceedings in the court below filed in this Court.

ested in an appeal, of the filing and pendency of the appeal from the Commission's order and (3) thereafter duly and timely filed a notice of intention to intervene and a verified statement showing the nature of its interest pursuant to Section 402(c), which provides that "any interested person" may intervene and participate in the proceeding upon an appeal from a Commission order by making such a filing.

STATUTES INVOLVED

Section 402 of the Communications Act of 1934, 48 Stat. 1093, as amended, 66 Stat. 718, 47 U.S.C. § 402, provides in pertinent part:

> "(a) Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission, under this Act (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in Public Law 901, Eighty-first Congress, approved December 29, 1950 [5 U.S.C. ch. 19A].
>
> "(b) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:
>
> "(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.
>
> "(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.
>
> "(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

"(4) By any applicant for the permit required by section 325 of this Act whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

"(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

"(6) By any person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), and (4) hereof.

"(7) By any person upon whom an order to cease and desist has been served under section 312 of this Act.

"(8) By any radio operator whose license has been suspended by the Commission.

"(c) Such appeal shall be taken by filing a notice of appeal with the court within thirty days from the date upon which public notice is given of the decision or order complained of. . . .

"(d) Upon the filing of any such notice of appeal the Commission shall, not later than five days after the date of service upon it, notify each person shown by the records of the Commission to be interested in said appeal of the filing and pendency of the same and shall thereafter permit any such person to inspect and make copies of said notice and statement of reasons therefor at the office of the Commission in the City of Washington. . . .

"(e) Within thirty days after the filing of any such appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and

statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission complained of shall be considered an interested party."

STATEMENT

Petitioner is an association with a membership of approximately 150 television stations located throughout the United States. Petitioner and its members are vitally interested in maintenance of television service of high technical quality to the public. Such service is assured by Federal Communications Commission rules that set minimum mileage separations between television stations operating on the same or adjacent channels to avoid or minimize electrical interference as between stations. Petitioner has consistently participated in proceedings before the Commission in support of these mileage separation rules, without regard to whether any affected station is one of its members, as a matter of principle and in the interest of the public and television broadcasters generally in order to assure the maintenance of a high technical quality of television service.

One such proceeding was a rule making proceeding assigned the Commission's docket number 13340. The problem to which the Commission addressed itself in that case was that of making available additional very high frequency (VHF) television channels (channels 2 through 13) in a number of major cities in the interim before full utilization of ultra high frequency (UHF) channels (channels 14 through 83) could be made. The conclusion of the Commission was to consider further whether to permit, under purported safeguards, the assignment of channels, in a limited number of specified cities, that would be closer than the Commission's

rules allowed to stations in other cities on the same or adjacent channels. (See FCC R. 299). Petitioner was a vigorous participant in Docket No. 13340.

One of the cities the Commission in Docket No. 13340 designated for further consideration was New Orleans, Louisiana. (See FCC R. 300). A construction permit had been issued, consistent with all Commission rules, for Channel 12 to serve that city, but the authorized transmitting facilities had not been built. The Commission said it would entertain an application for a modification of the Channel 12, New Orleans, construction permit to allow the transmitting facilities to be built closer to WJTV, Channel 12, in Jackson, Mississippi, than the standing rule of the Commission, 47 C.F.R. § 3.610, permitted. It provided that "interested parties may respond to the application." (*Ibid.*)[2]

The respondent New Orleans Television Corporation (New Orleans), therefore, applied for modification of the construction permit it held for Channel 12. (FCC R. 2, 17). The application as filed would permit New Orleans to locate its transmitter at a site about thirty miles closer to WJTV, the existing Channel 12 station of respondent Capitol Broadcasting Company (Cap-

[2] The procedure ordered to be followed in giving further consideration to the proposal for authorizing use of Channel 12 at New Orleans at mileage separations less than those specified in the Commission's rules differed from the procedure ordered to be followed in most of the other cases designated for further consideration. In such other cases the proposed channels were not then even assigned by § 3.606 of the Commission's rules to the designated cities and hence no applications for those channels could be filed. In such other cases the Commission ordered procedure by way of rule making to consider whether a short-spaced channel should be made available in any of the designated cities and, if so, to amend § 3.606 of the rules to make such a channel available for subsequent applications. Since Channel 12 already was available in New Orleans under § 3.606 of the rules, no rule making procedure was required to precede the consideration of applications.

itol), a member of petitioner, in Jackson, Mississippi, and about five miles closer to the authorized transmitter site for an adjacent-channel station in Houma, Louisiana, than the minimum distances permitted by the Commission's rules.

Capitol filed with the Commission a petition to deny the application (FCC R. 68-94), and the permittee of the Houma station filed a petition to designate the application for hearing or for other relief (FCC R. 62-67). Petitioner presented detailed engineering, policy and legal objections to the grant of the application urging, *inter alia*, that granting the application would be contrary to the public interest in retaining interference-free television service, made possible by the Commission's mileage separation requirements; that the New Orleans application should be considered simultaneously with the eight rule making proceedings involving the other "short-spacing" proposals arising from Docket No. 13340 so that the cumulative effect of all could be weighed; that a grant of the application would modify the licenses of Capitol and the Houma permittee, thus entitling them to a prior evidentiary hearing, and that, wholly apart from the impact on Capitol and the Houma permittee, the public interest in a nationwide system of television allocations required strict adherence to the standards intended to maintain the technical integrity of the system to avoid a haphazard, step-by-step erosion of technical performance. (FCC R. 110-15).[3]

[3] The objections themselves were in brief, summary form, but petitioner relied upon and incorporated by reference its comprehensive comments in the eight rule making proceedings in which the Commission was then considering other "short-spacing" proposals arising from Docket No. 13340 that presented issues virtually identical to those posed by New Orleans' application. The comments consisted of 40 pages of text supported by a detailed engineering affidavit, tables, maps and charts.

Further pleadings were filed by New Orleans and the protesting parties. (See FCC R. 298). New Orleans filed among other things a motion to strike the objections of petitioner on the ground that petitioner did not have a sufficient interest to entitle it to be heard. (FCC R. 117-26).

By order of July 25, 1962, the Commission granted New Orleans' application without hearing. (FCC R. 298-306; pp. 1a-14a, *infra*). By that same order the Commission denied New Orleans' motion to strike petitioner's objections. (FCC R. 299; pp. 2a-3a, *infra*). In doing so, it relied upon (a) Section 1.361(a) of its Rules, 47 C.F.R. § 1.361(a), which provides that "any person may file informal objections to the grant" of an application such as New Orleans had filed, (b) the fact that petitioner was one of the "interested parties" to the application, to which the Commission, in its order in Docket No. 13340, had reserved the right to respond to the New Orleans application, and (c) the "intimate inter-relationship between the present proceeding" and Docket No. 13340 in which, as we have said, petitioner had actively participated.

The Commission, having thus allowed petitioner's participation, proceeded to deal at some length with its contentions and purportedly to dispose of them. (FCC R. 301-02; pp. 5a-8a, *infra*).

Thereafter Capitol, pursuant to Section 402(b)(6) of the Communications Act, 47 U.S.C. § 402(b)(6), permitting an appeal by a person "aggrieved or whose interest is adversely affected" by a Commission order granting any of certain designated types of applications, filed an appeal from the order granting New Orleans' application in the Court of Appeals for the District of Columbia Circuit. (R. 1-9).

Upon the filing of the appeal the Commission notified petitioner of such filing and of the pendency of the appeal. The letter of notification specifically stated that it was mailed to petitioner's counsel "pursuant to the provisions of Section 402(d) of the Communications Act of 1934, as amended." (FCC R. 315). That statute, 47 U.S.C. § 402(d), provides that within five days of service upon it of a notice of appeal the Commission shall "notify each person shown by the records of the Commission to be interested in said appeal of the filing and pendency of the same." Within the time allowed petitioner, pursuant to Section 402(e) of the Communications Act, 47 U.S.C. § 402(e), filed in the Court of Appeals a notice of intention to intervene and a verified statement showing the nature of its interest. (R. 15-22). Section 402(e) provides that "any interested person may intervene and participate in the proceedings" upon an appeal under Section 402(b) by filing such a notice and such a statement.

The Commission and New Orleans moved separately to dismiss petitioner's notice of intention to intervene. The Commission in its motion took the position that because of the second sentence of Section 402(e), which specifies as one category of persons that shall be considered "interested" those "who would be aggrieved or whose interest[s] would be adversely affected by a reversal or modification of the order of the Commission complained of," only those who wish to support the Commission's order have a right to intervene under the section. (R. 33-36). The Commission did not dispute that petitioner otherwise was an "interested person." New Orleans urged additionally that petitioner's interest was not sufficient and that, if intervention in support of the appellant was ever proper, the prospective intervenor must show that it was a person

aggrieved or whose interest was adversely affected so as to give it a right to appeal. (R. 44-49).

On November 16, 1962, the Court of Appeals, without stating the grounds for its decision, granted the motions to dismiss. (R. 66; p. 15a, *infra*). On January 10, 1963, again without stating its grounds, it denied petitioner's petition for reconsideration and reconsideration *en banc*. (R. 93-94; pp. 16a-17a, *infra*).

The appeal meanwhile is going forward through briefing to argument and decision. Both New Orleans and respondent American Broadcasting-Paramount Theatres, Inc., owner of the television network (ABC) with which New Orleans' Channel 12 station will be affiliated and which did not participate in the proceeding before the Commission, have intervened and are participating in the appeal. Pursuant to the rules of the Court of Appeals petitioner asked consent of the parties to its filing a brief *amicus curiae*. All of the parties except New Orleans gave their consent. Petitioner then filed a motion for leave to file a brief and to participate in oral argument as *amicus curiae*. Over the opposition of New Orleans this motion was on February 18, 1963, granted as to the filing of a brief but denied as to oral argument. Petitioner's rights have been finally and adversely determined by dismissal of its notice of intention to intervene. *Cf. FCC* v. *NBC(KOA)*, 319 U.S. 239, 246. Grant of leave to file a brief *amicus curiae* does not alter this fact. The filing of such a brief is only at the discretion of the Court below rather than as of right. Moreover, petitioner will not have the right to file a reply brief (D.C. Cir. Rule 18[j][3]; compare R. 63-64) or to participate in oral argument or to seek or participate in any further review in this Court of the Court of Appeals' decision on the merits.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals for the District of Columbia Circuit affects the rights of would-be intervenors in every case in which review is sought of an order of the Federal Communications Commission granting or denying a license to construct or operate a television or radio station. In construing Section 402(e) of the Communications Act, 47 U.S.C. § 402(e), to prohibit intervention by petitioner in this case the court below has decided an important question of federal law that has not been and should be decided by this Court.[4]

By Section 402(b) of the Communications Act, 47 U.S.C. § 402(b), Congress has conferred exclusively on the Court of Appeals for the District of Columbia Circuit jurisdiction over appeals from certain categories of orders of the Federal Communications Commission, including all its orders relating to the grant, denial, renewal and modification of licenses to construct or operate television and radio stations. Thus, the decisions of that court on procedural points in appeals from FCC licensing orders are binding on all litigants unless reviewed by this Court.

Under the statute an appeal may be taken by one whose application is denied or, more generally, "by any person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any [such] application." The "person aggrieved . . ." phrase is language of art under which standing to prosecute an appeal depends upon the prospect of electrical interference or financial injury from the Commission's action. *FCC* v. *NBC (KOA)*, 319 U.S. 239, 246-47; *FCC* v. *Sanders Bros. Radio*

[4] The decision is final as to petitioner. Cf. Sam Fox Publishing Co. v. United States, 366 U.S. 683, 687-88.

Station, 309 U.S. 470, 476-77. In its principal effect it places the person who will be so injured by the grant of an application in the same position as the person whose application for a license is denied, enabling him "to appeal and to raise . . . any relevant question of law in respect of the order of the Commission." 309 U.S. at 477.

Without regard to whether petitioner could have appealed from the Commission's order, *cf. National Motor Freight Traffic Ass'n v. United States*, No. 479, opinion on denial of rehearing, February 25, 1963, the provisions of the Communications Act permitting intervention in appeal proceedings are much broader than those dealing with the taking of an appeal. In the first instance, the Commission must notify anyone shown by its records "to be interested" in an appeal of the filing and pendency of such an appeal. 47 U.S.C. §402(d). The Commission recognized in this case that petitioner was such a person by formally notifying it, pursuant to Section 402(d), of the filing of Capitol's appeal.

Thereafter, within thirty days after the filing of the appeal, Section 402(e) permits "any interested person" to intervene simply by filing a notice of intervention and a verified statement showing the nature of its interest. Petitioner complied with this provision of the statute.

Nevertheless, and for reasons it did not state, the court below granted motions to dismiss petitioner's notice of intervention. It must have done so on one of two grounds, each of which is quite untenable and either of which would have serious consequences for persons interested in a Commission order who have good reason to participate in a judicial test of its validity.

The first possible ground is that suggested by the Commission itself in its motion to dismiss petitioner's notice of intervention. This ground is that only those who seek to support the questioned order of the Commission may intervene in an appeal. To reach this result, the Commission urged the court below that the second sentence of Section 402(e), providing that "any person who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission complained of shall be considered an interested party," sets forth an all-inclusive definition of the term "any interested person" used in the first sentence of the statute. On this view the Congress, having in one sentence broadly described those entitled to intervene in an appeal from a Commission order by use of the phrase "any interested person," in the next sentence destroyed its own handiwork by defining that term so narrowly as to preclude intervention by any except those with the most vital and obvious interest in sustaining the Commission's order. This is contrary to the most elementary principle of statutory construction, which requires that effect be given to all parts of a statute. *E.g., United States* v. *Menasche*, 348 U.S. 528, 538-39. If the Congress had had the intention the Commission imputes to it, the logical and simple thing for it to do would have been to state in a single sentence that any person who would be aggrieved or whose interest would be adversely affected by reversal or modification of the Commission's order might intervene. That is not what the Congress did.

Indeed, it appears that the Congress quite deliberately chose not to take this course. The predecessor to Section 402(e) was first enacted in 1930, 46 Stat. 845, as part of a badly-needed comprehensive revision of the judicial review provision of the Radio Act of

1927, § 16, 44 Stat. 1169. The Committee on Radio Law of the American Bar Association had reported in 1929 that "in no respect is the Radio Act of 1927 more unsatisfactory than in the appellate procedure provided." 54 A.B.A. Rep. 461 (1929). For one thing, only a person whose license application had been denied or whose license had been revoked could appeal; there was no prevision for appeal by a person harmed by the grant of a license. For another thing, there was no specific provision for intervention; not even the right to be before the court of a person who would be directly and immediately harmed by the reversal or modification of the agency's order was clear. See *id.* at 461, 469; 55 A.B.A. Rep. 364 (1930).[5] The 1930 amendment granted the right of appeal to "any . . . person, firm, or corporation aggrieved or whose interests are adversely affected by" a Commission decision. As for intervention, it did not simply adopt a correlative provision that only a person who would be "aggrieved . . ." by reversal of a Commission decision could intervene. Rather, it provided, in substantially the broad terms of Sections 402(d) and (e) as they read today, for notice of ap-

[5] Persons claiming that they would be aggrieved by reversal of a Commission decision were arguing in the court of appeals at the time the 1930 amendment was adopted by the Congress that § 16 of the Radio Act could not constitutionally be construed to permit rendition of a judgment affecting their rights in a proceeding to which they were not parties. 55 A.B.A. Rep. 393 n. 3 (1930); see Intercity Radio Tel. Co. v. Federal Radio Comm'n, 46 F.2d 602 (D.C. Cir. 1931).

The deficiencies in § 16 mentioned in the text were in addition to the fact that the Court of Appeals was empowered by § 16 to "alter or revise the decision appealed from and enter such judgment as to it may seem just," which this Court in Federal Radio Comm'n v. General Elec. Co., 281 U.S. 464, construed as making the court's review administrative rather than judicial so that further review in this Court could not constitutionally be had. The 1930 amendment remedied this. See Federal Radio Comm'n v. Nelson Bros. Co., 289 U.S. 266.

peals to interested persons and for intervention by such persons.[6] The Congress went on to specify and thus leave no doubt that those who would be aggrieved or whose interests would be adversely affected by reversal—with whose plight the ABA committee was naturally most concerned—should be considered "interested." Congress did not manifest any intention, however, that they alone could intervene. Search of the contemporaneous legislative materials has revealed nothing from which such an intent could be inferred.

Not only is the Commission's construction of Section 402(e) erroneous, but also, if the decision below was based upon that construction, it would severely dislocate rights of intervention in appellate proceedings relating to Commission orders. It would mean that even a person with an interest substantial enough to enable him to appeal himself from a Commission order would not be able to intervene in an appeal. One result of this would be that if, for example, more than one appeal was taken from the same Commission order or appeals were taken by different parties from related Commission orders, the appealing parties could not

[6] The amendment provided that "any interested person, firm, or corporation" might intervene in an appeal "by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party." The second sentence of the section provided that "any person, firm, or corporation who would be aggrieved or whose interests would be adversely affected by a reversal or modification of" the Commission's order "shall be considered an interested party." 46 Stat. 845. The word "party" apparently was used to avoid repetition of the phrase "person, firm, or corporation." When the Communications Act of 1934 was adopted, containing a definition of person to include corporations and other entities, § 3(i), 48 Stat. 1066, the openings of the two sentences were simplified to read simply "person," but the word "party" continued to be used elsewhere. In light of this history, the use of the word "party" in § 402(e) is not relevant to the issue raised by this petition.

intervene in any companion appeal. The court below has permitted intervention in those circumstances. See, *e.g.*, *Bendix Aviation Corp.* v. *FCC*, 272 F.2d 533 (D.C. Cir. 1959). A further result would be that a person with an appealable interest must himself appeal within the thirty days allowed or be forever precluded from participation in any appeal proceedings arising from an order of the Commission.

The second possible ground of the decision of the court below is that suggested by the respondent New Orleans. This is that Section 402(e) permits intervention only by persons who would be aggrieved or whose interests would be adversely affected either by affirmance or by reversal of the Commission's order. This view, which differs from that of the Commission in that it would permit a narrowly defined group of persons to intervene on the side of an appellant, is altogether indefensible. It equates the right to intervene on the side of the appellant with the right to appeal and thus ignores the fact that Congress deliberately used the phrase "any interested person" in Section 402(e), thus broadly describing the category of persons with intervention rights, as opposed to the narrow and restrictive "person aggrieved . . ." phrase used in Section 402(b)(6) to describe those who can appeal from a Commission order. There is no basis whatever for obscuring, as New Orleans urged the court below to do, this marked difference in statutory language.

To adopt New Orleans' view of the statute would have substantially the same disruptive effects upon intervention rights in FCC appeal proceedings as the Commission's view. While intervention on the side of the Commission by one with technical standing to appeal would be permitted—thus avoiding one of the

extreme consequences of the Commission's construction of the statute—all others, whatever their status in the Commission proceedings, whatever the extent of their contribution to the record on which the Commission order was based and however vital their interest in that order, would be foreclosed.

2. The term "any interested person"—the language of Section 402(e) of the Communications Act—or an equivalent is used three times in the Administrative Procedure Act to describe persons entitled to take part in agency rule making or adjudicatory proceedings in contexts that admit of no doubt that something other than a technical "party in interest" or "person aggrieved" is meant.

This Court has recognized that the language of Section 402(e) is parallel to that language of the Administrative Procedure Act. In *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 193, the Court declared in connection with a petition to review a Commission order in a rule making proceeding:

> "As required by 5 U.S.C. § 1003(b) [Section 4(b) of the Administrative Procedure Act], the notice [of proposed rule making] permitted 'interested' parties to file statements or briefs. Such parties might also intervene in appeals. 47 U.S.C. § 402(d) and (e)."

Section 4(b) of the Administrative Procedure Act, to which the Court referred, provides that "the agency shall afford *interested persons* an opportunity to participate in the rule making . . ." Similarly, Section 6(a) of the Act, 5 U.S.C. § 1005(a), provides:

> "So far as the orderly conduct of public business permits, *any interested person* may appear before any agency or its responsible officers or employees

> for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency function."

And Section 6(d), 5 U.S.C. § 1005(d), requires that the agency give prompt notice "of the denial in whole or in part of any written application, petition, or other request of *any interested person* made in connection with any agency proceeding."

Even in the absence of Section 1.361(a) of the Commission's Rules and the special circumstances upon which the Commission relied in permitting petitioner to participate in the proceeding before it (p. 8, *supra*), there is no doubt that under Section 6(a) of the Administrative Procedure Act petitioner was entitled to file its objections to New Orleans' application. And, since there is no warrant for believing that the Congress meant something different by "any interested person" in Sections 6(a) and (d) of the Administrative Procedure Act from what it meant by "interested persons" in Section 4(b) of the same statute, it is plain that, as this Court stated in the *Storer* case, persons so entitled to participate in agency proceedings "might also intervene in appeals" under the similar language of Section 402(e).

Furthermore, in the passage that we have quoted from the *Storer* opinion this Court referred to both subsections (d) and (e) of Section 402 of the Communications Act. In doing so, it correctly recognized that they are to be read as two parts of an integrated statutory scheme. The notice of the filing and pendency of an appeal that must be given by the Commission pursuant to Section 402(d) to "each person shown by [its] records . . . to be interested in said appeal" is designed to do more than satisfy the curiosity or

academic interest of such persons. Its purpose is to assure that such persons will have the opportunity to exercise the right of intervention conferred upon them by the next succeeding subsection, Section 402(c). That this is so is made even clearer by consideration of this fact: Prior to 1952 the statutory notification of the filing of an appeal had to be given to "each person shown by the records of the Commission to be interested in such appeal *and to have a right to intervene therein under the provisions of this section.*" Communications Act of 1934, § 402(c), 48 Stat. 1093. In omitting the italicized clause in the 1952 amendments to the Communications Act, 66 Stat. 719, the Congress was simply deleting a redundancy. Although the report of the Senate Committee, where the amendments originated, treated the amendment to the judicial review provisions of the statute at some length, it did not even mention this change. See S. Rep. No. 44, 82d Cong., 1st Sess. 11-12 (1951) ("Subsection (d) would continue in effect, substantially, the provisions of section 402(c) of existing law."); *cf.* H.R. Rep. No. 1750, 82d Cong., 2d Sess. 16-18 (1952).

3. Finally, if the decision of the court below is allowed to stand it will produce the anomalous result that intervention will be liberally granted in some FCC review proceedings and narrowly restricted, as in this case, in scarcely distinguishable proceedings.

Where the Congress has dealt by statute with rights of intervention in proceedings to review administrative orders, it has conferred such rights in the same broad terms in which Section 402(c), if so read as to give effect to its plain meaning, confers them. These statutes include Section 8 of the Judicial Review Act of 1950, 5 U.S.C. § 1038, which governs review of, among

other things, orders of the Federal Communications Commission other than those from which appeals may be taken under Section 402(b). Section 8 provides, first, that any

> "parties in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right . . .."

and goes on to provide:

> "Communities, associations, corporations, firms, and individuals, whose interests are affected by the agency's order, may intervene in any proceeding to review such order."

The provision for intervention in proceedings to review orders of the Interstate Commerce Commission, 28 U.S.C. § 2323, is similar.[7] And under either statute it is clear that one in the position of petitioner here may intervene. See *Montship Lines, Ltd.* v. *Federal Maritime Board*, 295 F.2d 147, 151-52 (D.C. Cir. 1961);

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[7] Both of these statutes derive from the sections of the Mann-Elkins Act of 1910, 36 Stat. 539-44, that created the Commerce Court to review decisions of the Interstate Commerce Commission and provided for its procedures. See § 5, 36 Stat. 543. By the Urgent Deficiencies Act of 1913, which substituted three-judge district courts for the Commerce Court as ICC review tribunals, the Mann-Elkins Act procedural provisions were made applicable to proceedings before such courts. 38 Stat. 220. Under the Communications Act of 1934 review of Federal Communications Commission orders other than those subject to appeal to the Court of Appeals for the District of Columbia Circuit were to be had pursuant to the Urgent Deficiencies Act. § 402(a), 48 Stat. 1093. The Judicial Review Act of 1950 replaced the three-judge district courts with the courts of appeals and took over from the Urgent Deficiencies Act procedural provisions, including that dealing with intervention.

Nashville Grain Exch. v. *United States*, 191 Fed. 37, 39 (Commerce Ct. 1911), *rev'd on other grounds*, 235 U.S. 314; *Utah Citizens Rate Ass'n* v. *United States*, 192 F. Supp. 12, 15 (D. Utah 1960), *aff'd*, 365 U.S. 649; *Board of Pub. Util. Comm'rs* v. *United States*, 132 F. Supp. 379, 382 (D.N.J. 1955).

In the court below the Commission urged that a distinction as to the permissible scope of intervention between review proceedings under Section 402(a) of the Communications Act and appeals under Section 402(b) was justified on a policy ground. It said that petitions for review under Section 402(a) are typically from rule making proceedings in which a large number of persons may be directly affected, whereas in a licensing proceeding the number of persons directly affected is likely to be smaller. (R. 84-85). But at least since 1952, when the Commission adopted its over-all allocation of television channels, *Sixth Report on Television Allocations*, 1 Pike & Fischer Radio Reg. 91:599 (1952), most of the important Commission television rule making proceedings have looked toward changes in particular television channel assignments and have been very like licensing proceedings in the number of interested parties and the impact of the Commission's decision upon individual private interests. The court below so recognized in *Sangamon Valley Television Corp.* v. *United States*, 269 F.2d 221, 224 (D.C. Cir. 1959), a Section 402(a) review of a rule making proceeding, when it agreed with the Department of Justice that "whatever the proceeding may be called it involved not only allocation of TV channels among communities but also resolution of conflicting private claims to a valuable privilege . . .."

Thus, as this Court said of another effort by the Government to explain why the procedure on appeal

from a Commission order should differ from the procedure on what was then review under the Urgent Deficiencies Act, "The considerations of policy which are invoked are as fragile as the legislative materials are inapposite." *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 14.[8]

The anomaly created by the decision below, whatever its ground, is aptly illustrated by this very case. The City of New Orleans differed from most other cities considered in the Commission's Docket No. 13340 in that Channel 12 had already been assigned and a construction permit had already been issued for that channel to serve the city—both consistent with Commission mileage separation requirements. Thus, the proceeding before the Commission to deviate from these requirements was on an application to modify the exist-

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[8] The only "legislative material" cited by the Commission or New Orleans below—and then only belatedly, in answer to petitioner's petition for reconsideration—is a passage in the report of the House Committee on 1952 amendments to the Communications Act. The passage is "inapposite." The 1952 amendments made only the most minor of wording changes in § 402(e). *Compare* § 402(d), 48 Stat. 1094, *with* § 402(e), 66 Stat. 719. The House Committee in its report paraphrased the first sentence of § 402(e) and then said, as to the second sentence, that "an 'interested party' is defined as any person who would be aggravated [sic] or whose interest would be adversely affected by a reversal or modification of the order of the Commission which is complained of." H.R. Rep. No. 1750, 82d Cong., 2d Sess. 17 (1952). Such a stock (and not altogether accurate) committee paraphrase of a statute long in effect that was in substance being re-enacted is a weak underpinning for an argument as to Congressional intent. The fact is that Congress in 1952 made no substantial change in § 402(e) and clearly did not mean to change its intent, which was, as we have seen, to grant the right of intervention broadly. This is demonstrated by the Senate Committee report on the same bill, which said, "Subsection (e) is a redraft of section 402(d) of existing law, with minor clarifying amendments." S. Rep. No. 44, 82d Cong., 1st Sess. 12 (1951).

ing construction permit, which is subject to appeal under Section 402(b). With respect to most other cities affected by the Commission's action in the omnibus case, rule making proceedings that may result in changes in allocation of television channels—not the grant of construction permits—were first necessary. Commission orders in these cases will be reviewable under Section 402(a). In substance and practical effect the proceedings are virtually identical. Petitioner is participating in those rule making proceedings, and there is no doubt that under Section 8 of the Judicial Review Act it will be able to intervene in any review that is had of any such proceeding whether it supports the Commission or the party petitioning for review. The artificial distinction created by the decision below between those cases and this one should be reviewed by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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